

BRIAN M. GROSSMAN (SBN 166681)
TESSER & RUTTENBERG
12100 Wilshire Blvd., Suite 220
Los Angeles, California 90025
Tel: (310) 207-4022
Fax: (310) 207-4033
Email: bgrossman@tesser-ruttenberg.com

Attorneys for Defendants
SWISH MARKETING, INC., and
MATTHEW PATTERSON

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

FEDERAL TRADE COMMISSION,

Plaintiffs,

vs.

SWISH MARKETING, INC., a corporation,
MARK BENNING, individually and as an
officer of SWISH MARKETING, INC.,
MATTHEW PATTERSON, individually
and as an officer of SWISH MARKETING,
INC., and JASON STROBER, individually
and as an officer of SWISH MARKETING,
INC.,

Defendants.

Case No.: C09 03814 RS

[Hon. Richard Seeborg]

**DEFENDANTS SWISH MARKETING
AND MATTHEW PATTERSON'S
MOTION *IN LIMINE* TO EXCLUDE
EVIDENCE OF CONSUMER LOSSES
IN EXCESS OF AMOUNTS RECEIVED
BY DEFENDANTS; MEMORANDUM
OF POINTS AND AUTHORITIES;
DECLARATION OF MATTHEW
PATTERSON IN SUPPORT**

Date: October 7, 2010

Time: 1:30 p.m.

Place: U.S. Courthouse

450 Golden Gate Avenue

Courtroom 3, 17th Floor

San Francisco, CA 94102

Complaint Filed: August 19, 2009

Trial Date: None Set

PLEASE TAKE NOTICE that, on October 7, 2010, at 1:30 p.m. in Courtroom 3 of the
above-entitled Court, located at 450 Golden Gate Avenue, San Francisco, California 94102, or as
soon thereafter as the matter may be heard, defendants Swish Marketing, Inc. ("Swish") and

1 Matthew Paterson ("Patterson") shall and hereby do move for an order *in limine* excluding any
 2 mention or evidence of funds paid by consumers relating to the purchase of an EverPrivate Card or
 3 Secret Cash Card beyond those amounts that were paid to, received by and/or are otherwise directly
 4 traceable into the hands of Swish.

5 This motion (the "Motion") is made on the ground that the FTC Act allows for equitable
 6 relief only (as opposed to legal damages), and under well-accepted principles of equity Swish's
 7 pecuniary liability is limited to (1) monies that can be traced to Swish and identified specifically,
 8 or (2) disgorgement of the profits Swish made from VirtualWorks' sale of the debit cards at issue
 9 herein, and without regard to total payments by consumers to VirtualWorks. Here, the plaintiff has
 10 stated an intention to seek a monetary award based not on profits made by Swish, but rather on the
 11 total sum of monies received by VirtualWorks. Accordingly, a motion *in limine* is appropriate at
 12 this juncture to determine the methodology for computing a monetary award, which in turn will
 13 provide the parties with parameters for discovery and, perhaps, a possible settlement.

14 This Motion is based upon the Notice of Motion and Motion, the attached Memorandum of
 15 Points and Authorities and Declaration of Matthew Patterson, all the pleadings, papers and records
 16 on file in the matter herein, and upon such argument and further evidence as may be presented at the
 17 hearing thereon.

18
 19 DATED: August 31, 2010

TESSER & RUTTENBERG
 BRIAN M. GROSSMAN

21 /s/ Brian M. Grossman
 22 BRIAN M. GROSSMAN
 23 Attorney for Defendants
 SWISH MARKETING, INC., and
 MATTHEW PATTERSON

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2
3 **I**

4 **INTRODUCTION AND SUMMARY OF ARGUMENT**

5 In this case, plaintiff alleges that Swish violated the FTC Act, 15 U.S.C. § 45 *et seq.*, by
6 hosting certain Internet advertisements by a company called VirtualWorks for the sale of debit
7 cards.¹ The VirtualWorks' advertisements contained a pre-checked "Yes" box which, if not
8 affirmatively changed to "No" by the consumer, resulted in VirtualWorks' ability to debit
9 consumers' bank accounts for the price of the debit card, which ranged from \$39.95 to \$54.95.
10 Although each advertisement included a notification to consumers that they were authorizing
11 VirtualWorks to charge them for a debit card, plaintiff contends that the notification was inadequate,
12 and that the advertisements constituted a "deceptive act or practice" in violation of the FTC Act.

13 In addition to injunctive relief, plaintiff seeks "between \$6 and \$7 million" in equitable
14 restitution from Swish and its principals, which amount "represents estimated gross sales of the
15 prepaid debit card from Defendants' websites in 2006 and 2007, less refunds." [Dkt. #70 (Joint Case
16 Management Statement), p. 12, lines 1-8]. The amount of "gross sales of the prepaid debit card from
17 Defendants' websites," however, is much greater than the amounts actually paid to Swish, because
18 VirtualWorks – not Swish – was the entity selling the debit cards and receiving 100% of the
19 proceeds therefrom. VirtualWorks then paid Swish only between \$13 and \$15 for each consumer
20 whose information was transmitted to (and accepted by) VirtualWorks. [Dkt. #82 (First Amended
21 Complaint), p. 5, ¶ 21]. As such, plaintiff's requested monetary relief is **millions** of dollars more
22 than the total gross proceeds Swish received from its association with VirtualWorks' debit card
23 offer, let alone its net profits.

24 This Court has previously held that, under *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107 (9th Cir.
25 1982) "and the subsequent reliance on *Singer* ... by myriad courts," the plaintiff is entitled to seek
26 and recover restitution as "ancillary" to the equitable injunctive relief expressly provided for under

27
28 ¹ VirtualWorks was one of about 20 companies for which Swish hosted advertisements.
[Declaration of Matthew Patterson, ¶ 3].

1 the FTC Act, 15 U.S.C. § 53(b). [Dkt. #60 (Order Granting Motion to Dismiss and Denying Motion
 2 to Strike), pp. 8-15]. Such restitution, however, must be **equitable** restitution because the Court's
 3 power to award relief under the FTC Act lies only in equity. As held by the U.S. Supreme Court,
 4 equitable restitution is limited to "money or property identified as belonging in good conscience to
 5 the plaintiff [which] could clearly be traced to particular funds or property in the defendant's
 6 possession." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002).
 7 Consequently, a defendant's pecuniary liability under the FTC Act is generally limited to what it
 8 received, as opposed to what consumers lost. *See, e.g., FTC v. Verity Intern., Ltd.*, 443 F.3d 48, 67
 9 (2nd Cir. 2006) ("The district court measured the appropriate amount of restitution as 'the full
 10 amount lost by consumers.' **This was error.** The appropriate measure for restitution is the benefit
 11 unjustly received by the defendants.") (Emphasis supplied).

12 Notwithstanding the forgoing authorities, plaintiff seeks restitution measured by consumer
 13 loss rather than Swish's receipts, which is wholly inconsistent with the holdings of both *Great-*
 14 *West* and *Verity*. Moreover, the plaintiff's request for between \$6 and \$7 million in restitution more
 15 than doubles the amount in controversy in this action, which in turn places a substantial impediment
 16 upon settlement negotiations (*i.e.*, the plaintiff believes that this case is worth millions more than
 17 the defendants), and greatly complicates discovery concerning the monies that VirtualWorks and
 18 Swish received. For each of these reasons, the defendants believe that a motion *in limine* is appro-
 19 priate at this juncture so that the parties may determine the measure of monetary relief in this case.

21 II

22 ARGUMENT

23 A. The Court Is Empowered To Consider A Pre-Trial Motion *In Limine*

24 The District Court has the discretion to consider pre-trial motions *in limine*. *See In re*
 25 *Japanese Elec. Products Antitrust Litigation*, 723 F.2d 238, 260 (3rd Cir. 1983), *rev'd on other*
 26 *grounds*, 475 U.S. 574 (1986) ("[I]n limine ruling on evidence is a procedure which should, in a trial
 27 court's discretion, be used in appropriate cases. [I]n limine procedure permitted more thorough
 28 briefing and argument than would have been likely had the rulings been deferred."). Moreover, such

1 motions need not be made only on the eve of trial. *See U.S. v. Cook*, 608 F.2d 1175, 1186 (9th Cir.
 2 1979) ("There is no need ... to decide when, during pretrial proceedings or the trial, a motion In
 3 limine should be made, or when it should be ruled upon. The matter should be left to the discretion
 4 of the trial court with a reminder that advance planning helps both parties and the court."); *Kassim*
 5 *v. City of Schenectady*, 415 F.3d 246, 250 (2nd Cir. 2005) (court properly granted motion *in*
 6 *limine* limiting the type and scope of recoverable damages).

7 Here, the plaintiff intends to introduce evidence of the "gross sales of the prepaid debit card
 8 from Defendants' websites in 2006 and 2007, less refunds." [Dkt. #70 (Joint Case Management
 9 Statement), p. 12, lines 1-8]. Such sales, plaintiff contends, represent the amount of equitable
 10 restitution for which the Defendants are liable. Defendants, on the other hand (and based upon the
 11 authorities cited above), contend that evidence of "gross sales" is irrelevant because equitable
 12 restitution is limited by the Defendants' **receipts**, as opposed to VirtualWorks' gross sales.
 13 Accordingly, Defendants submit that a motion *in limine* is the proper vehicle to adjudicate whether
 14 or not plaintiff's evidence of **VirtualWorks'** gross sales is relevant to the question of monetary relief.
 15 If this fundamental issue can be resolved at this juncture, it will facilitate not only settlement
 16 negotiations but also the scope of discovery necessary to prepare for trial.

17 **B. Evidence Of VirtualWorks' Gross Sales Of The Debit Card Is Irrelevant To**
 18 **The Measurement Of An Equitable Restitution Award Against Swish**

19 The Second Circuit in *Verity* made clear that the doctrine of equitable restitution prohibits
 20 the FTC from recovering more than the amount that can "clearly be traced" from consumers into the
 21 hands of defendants in an action based on a violation of Section 5(a) of the FTC Act. In *Verity*,
 22 several companies participated in a complex operation whereby Internet users agreed to pay long-
 23 distance telephone charges (to Madagascar) in return for Internet access to pornography sites.
 24 Receipts from these long-distance telephone charges were effectively split between the participating
 25 companies, which included the long-distance carriers (AT&T and later Sprint), the pornography web
 26 sites, the telecommunications carrier for Madagascar, the company that sold the long-distance dialer
 27 program, and the companies that coordinated billing (*i.e.*, the defendants). *Verity*, 443 F.3d at 52-54.

1 The FTC sued the billing coordinators for violation of the FTC Act, alleging that the
 2 aforementioned billing system was a deceptive act or practice because it allowed a telephone line
 3 subscriber to be charged long-distance telephone charges without his knowledge or consent
 4 (assuming the Internet user who visited the pornography sites and agreed to pay the long-distance
 5 telephone charges was not also the telephone line subscriber). *Verity*, 443 F.3d at 54-55.
 6 Notwithstanding the fact that the billing coordinators received only a fraction of the long-distance
 7 telephone charges that consumers paid, the FTC sought (and received from the District Court) an
 8 award of monetary relief equal to the total consumer loss, *i.e.*, the total amount of the long-distance
 9 telephone charges. *Id.* at 67.²

10 The Second Circuit reversed the District Court's methodology for calculating monetary relief
 11 under the FTC Act, and held that "the proper measure for [monetary relief under the FTC Act] is the
 12 benefit unjustly received by the defendants." *Verity*, 443 F.3d at 67. The Court held that the
 13 historical limitations on equitable remedies restrict the courts to provide only "equitable restitution"
 14 as opposed to "legal restitution" based on Section 13(b)'s equitable nature. The court explained that
 15 "equitable restitution" provides that only money or property that can "clearly be traced" into the
 16 hands of the alleged wrongdoer can be ordered disgorged. "Legal restitution, on the other hand, was
 17 awarded where the plaintiff was unable to trace the funds into the defendant's hands but 'nevertheless
 18 had some basis for recovering for some benefit that the defendant wrongly received from the
 19 plaintiff.'" *Verity*, 443 F.3d at 66-67 (quoting Justice Scalia in *Great-West*, *supra*, 534 U.S. at 213).

20 The Second Circuit concluded that "because the availability of restitution under Section
 21 13(b) of the FTC Act, to the extent it exists, derives from the district court's equitable jurisdiction,
 22 it follows that the district court may award only equitable restitution." *Verity*, 443 F.3d at 67. *Verity*
 23 makes clear that "equitable restitution" pursuant to Section 13(b) means only those consumer losses

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 27 ² Presumably, the FTC sought "the full amount lost by consumers" from the billing
 28 coordinators because the FTC Act does not apply to "common carriers" like AT&T and Sprint. 15
 U.S.C. § 45(a)(2).

1 that can "clearly be traced" into the defendants' hands.³ Additional consumer losses paid to other
 2 parties that are not traceable into the hands of the defendants are not recoverable under Section
 3 13(b). *Id.*; see also Restatement (Third) of *Restitution*, § 2 (Discussion Draft 2000) ("Liability in
 4 restitution is based on and measured by the receipt of a benefit"); Douglas Laycock, *The Scope*
 5 *and Significance of Restitution*, 67 Tex. L.Rev. 1277, 1279 (1989) ("[R]estitution measures recovery
 6 by defendant's gain rather than plaintiff's loss").

7 *Verity's* analysis, and its conclusion that the amount of monetary relief under Section 13(b)
 8 of the FTC Act cannot exceed the defendant's actual receipts, has been followed in *FTC v. Bronson*
 9 *Partners, LLC*, 674 F.Supp.2d 373, 379-380 (D.Conn. 2009) (Monetary relief under the FTC Act
 10 "is restitutionary in nature and does not alter the core principle that restitution is measured by a
 11 defendant's unjust gain."). Moreover, other Circuits, including the Third, Fourth and Eleventh, have
 12 reached the same conclusion as *Verity* in applying equitable remedies in non-FTC cases. See *CFTC*
 13 *v. Am. Metals Exch. Corp.*, 991 F.2d 71, 76-79 (3d Cir. 1993) (Commodity Exchange Act's equitable
 14 monetary remedy is limited to "disgorgement of ill-gotten gains"; an award of "damages" "falls
 15 outside that remedy's recognized parameters."); *Ellet Bros., Inc. v. U.S. Fidelity & Guar. Co.*, 275
 16 F.3d 384, 388 (4th Cir. 2001) ("Restitution and disgorgement require payment of the defendant's
 17 ill-gotten gain, not compensation of the plaintiff's loss."); *CFTC v. Wilshire Inv. Mgmt. Corp.*, 531
 18 F.3d 1339, 1345 (11th Cir. 2008) (citation omitted) ("The equitable remedy of restitution does not
 19 take into consideration the plaintiff's losses, but only focuses on the defendant's unjust
 20 enrichment.").

21 In discussions throughout this litigation, the FTC has taken the position that the Ninth Circuit
 22 (unlike the Second) does not limit the FTC's recovery to equitable restitution, *i.e.*, money actually
 23 received by the defendant, and instead permits the recovery of traditional damages, *i.e.*, total
 24 consumer losses. The FTC will presumably rely upon *FTC v. Stefanchik*, 559 F.3d 924 (9th Cir.
 25 2009). In *Stefanchik*, the FTC sued John Stefanchik, the creator of a "program purporting to teach
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27 ³ The *Verity* Court did not address the separate remedy of disgorgement, which may be
 28 available under Section 13(b). Any calculation of disgorgement, however, would necessarily be
 based on Swish's actual receipts, not VirtualWorks' receipts.

1 purchasers how to become wealthy by buying and selling privately held mortgages.” *Id.* at 926. The
2 FTC alleged that, contrary to Mr. Stefanchik’s representations, “it was in fact very difficult for
3 individuals to amass wealth using the Stefanchik method,” and that therefore Stefanchik’s claims
4 were deceptive and misleading, in violation of the FTC Act. *Id.* at 927. In addition to naming
5 Stefanchik as a defendant, the FTC also sued Beringer Corporation (“Beringer”), the wholly-owned
6 corporation to which Stefanchik had assigned the copyrights to the “Stefanchik Method,” as well
7 as a company called Atlas Marketing, Inc. (“Atlas”), whose “sole business was to sell products and
8 services for Stefanchik and Beringer under the name ‘The Stefanchik Organization.’” *Id.* at 926.
9 Atlas “promoted the Stefanchik Program through direct mail, telemarketing, and a website, and it
10 paid Stefanchik and Beringer a royalty of 15% to 22% of the sales.” *Id.*

11 The District Court entered summary judgment against Stefanchik and Beringer, and awarded
12 over \$17 million in damages, which figure was derived from Atlas’s net sales of Stefanchik
13 products, as opposed to Stefanchik’s and/or Beringer’s actual receipts, which were but a fraction
14 thereof. *Stefanchik*, 559 F.3d at 931. In affirming the District Court’s measure of monetary relief,
15 the Ninth Circuit relied on the following critical facts: (1) Stefanchik retained authority to review
16 and approve all of Atlas’s marketing materials and made the decision as to what products were sold
17 by Atlas (*see id.* at 931-32 (“Stefanchik and Beringer were the driving force behind [Atlas’s]
18 marketing scheme for the Stefanchik Program, with authority to control its key components”));
19 (2) Atlas used the name “The Stefanchik Organization” to advertise and sell Stefanchik products,
20 which was Atlas’s sole business; and (3) “[t]he lines between Atlas and Beringer were blurred to
21 such an extent that Atlas’s conduct and representations had at least the apparent imprimatur of
22 Beringer.” *Id.* at 930-31. Based upon these facts, the Ninth Circuit agreed with the District Court’s
23 finding that Atlas was Beringer’s agent. *Id.* at 930. In effect, Stefanchik was the prime mover who
24 sold his product through Atlas.

25 Defendants submit that *Stefanchik* is not in any way a departure from the holdings of *Verity*,
26 *Great-West* and the myriad of cases that have followed them. Rather, *Stefanchik* merely followed
27 well-established case law that a principal is liable for its agents acts. Because the undisputed facts
28 in *Stefanchik* amply demonstrated that Atlas was essentially working for Stefanchik and Beringer,

1 Atlas's liability under principles of equitable restitution (*i.e.*, \$17 million) could be imputed to
 2 Stefanchik and Beringer, as Atlas's principals. There is no indication that the *Stefanchik* court
 3 intended to create liability beyond the parameters of equitable restitution discussed by the Supreme
 4 Court in *Great-West* and followed by the Second Circuit in *Verity*. Indeed, the *Stefanchick* Court
 5 does not even discuss those precedents.

6 Here, there is no evidence that VirtualWorks was Swish's agent, or vice-versa. The Atlas-
 7 Beringer relationship differs from the VirtualWorks-Swish relationship in several key respects: (1)
 8 Swish and VirtualWorks had many business relationships besides each other, whereas Atlas's only
 9 business relationship was with Beringer; (2) Swish did not utilize VirtualWorks' name or the names
 10 of its products in Swish's business operations, whereas Atlas provided its services under the name
 11 "The Stefanchik Organization"; and (3) Swish did not design the content of VirtualWorks'
 12 advertisements, whereas Stefanchik and Beringer had complete control over Atlas's marketing
 13 materials and strategies. [Declaration of Matthew Patterson, ¶¶ 3-8]. Unlike the fact pattern in
 14 *Stefanchik*, there is no evidence in this case to support an agency relationship between VirtualWorks
 15 and Swish, through which VirtualWorks' liability under principles of equitable restitution could or
 16 should be imputed to Swish. To declare that this case is factually distinguishable from *Stefanchik*
 17 is an understatement.

18 The monetary award affirmed in *Stefanchik* makes sense precisely because "[t]he lines
 19 between Atlas and Beringer were blurred to such an extent that Atlas's conduct and representations
 20 had at least the apparent imprimatur of Beringer." *Stefanchik*, at 930-31. Beringer and Stefanchik
 21 were held responsible for Atlas's receipts not because that was the "total consumer loss," but rather
 22 because: (a) Atlas's liability was properly measured by its sales of the (deceptive) Stefanchik
 23 Program; and (b) Atlas and Beringer/Stefanchik had an agent/principal (if not alter ego) relationship.
 24 To suggest that *Stefanchik* stands for the proposition that "total consumer loss" irrespective of the
 25 defendant's actual receipts is now the "new and improved" measurement of monetary relief flies in
 26 the face of equity, which is what the FTC Act is expressly designed to achieve. Here, the FTC is
 27 seeking "total consumer loss" in an amount that is roughly three times what Swish was actually paid.
 28 Swish would argue that such relief is not only unauthorized under the FTC Act, but also patently

1 inequitable. Moreover, a “total consumer loss” theory taken to its logical conclusion would allow
 2 the FTC to pursue Swish for between \$6 and \$7 million even if Swish received 50 cents per lead,
 3 or roughly **one percent** of VirtuaWorks’ revenue.

4 Based upon the foregoing, the Defendants respectfully submit that *Stefanchik* does not and
 5 indeed cannot hold that total consumer loss, irrespective of the defendant’s actual receipts, is an
 6 appropriate monetary remedy under Section 13(b) of the FTC Act. Such an interpretation of
 7 *Stefanchik* is unrealistic and wholly contrary to the principles of equity that the FTC Act is designed
 8 to enforce. Moreover, and as set forth above, the Defendants herein have little in common with
 9 Stefanchik or even the billing coordinators in *Verity* (who were key players in the design and
 10 implementation of the Madagascar long-distance telephone charge scheme). Unlike those
 11 defendants, Swish played no conceptual or “design” role in the allegedly-deceptive practice. If
 12 Swish is ultimately held responsible for participating in a deceptive business practice, principles of
 13 equity mandate that its liability be limited by its actual receipts. There is no basis under *Stefanchik*
 14 to allow the FTC to impute VirtualWorks’ liability (*i.e.*, its receipts) to the Defendants herein.

16 III

17 CONCLUSION

18 This action will involve convoluted discovery without a serious chance to settle until the
 19 proper measurement of monetary relief is resolved, which is why the Defendants seek such
 20 clarification now through this Motion *in Limine*. Consequently, and based upon the foregoing,
 21 Swish and Patterson respectfully request that the Court enter an order *in limine* excluding any
 22 mention or evidence of funds paid by consumers relating to the purchase of an EverPrivate Card or

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1 Secret Cash Card beyond those amounts that were paid to, received by and/or are otherwise directly
2 traceable into the hands of Swish.

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4 DATED: August 31, 2010

TESSER & RUTTENBERG
BRIAN M. GROSSMAN

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6
7 /s/ Brian M. Grossman
BRIAN M. GROSSMAN
Attorney for Defendants
8 SWISH MARKETING, INC., and
9 MATTHEW PATTERSON
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DECLARATION OF MATTHEW PATTERSON

I, MATTHEW PATTERSON, Declare as follows:

1. I am the chief executive officer of defendant Swish Marketing, Inc. ("Swish"). At all times relevant hereto, I was a director, officer and shareholder of Swish, and familiar with its day-to-day operations. I make this Declaration in support of the foregoing Motion *in Limine*. I have personal knowledge of each of the following facts, and would and could competently testify thereto if called upon to do so as a witness.

2. Swish is an online lead generation company, founded in 2004. "Lead generation" means that we sell potential customer names and information to buyers who then try to sell products to those customers. For example, Swish operated several web-sites where consumers could submit information in furtherance of obtaining a short-term "payday" loan. Swish would then forward the consumers' information to one or more payday lenders, and if the lender accepted the consumer as a potential borrower, it would pay Swish a fee for that "lead."

3. In or around the Fall of 2006, Jerry Klein ("Klein") on behalf of his company VirtualWorks approached Swish to purchase leads for his product called SecretCashCard. Klein's product as he described it was a suite of software products combined with a prepaid debit card that allowed people to surf the web and purchase products anonymously. At that time, Swish was looking for additional clients/promotions to place on its web sites, and therefore agreed to place VirtualWorks' advertisements (along with about 20 other advertisers) on some of Swish's web pages.

4. VirtualWorks designed its advertisement, gave us the specific wording and approved the ad before we placed it on our web pages. The VirtualWorks advertisements were presented along with the advertisements of three other businesses that had "yes" and "no" buttons. An example of these advertisements appears at Exhibit "B" to the First Amended Complaint (the "FAC") filed in this action.

5. After we launched the promotion, Josh Finer of VirtualWorks asked me to please precheck the "yes" button rather than "no," in order to "get volume up."

6. VirtualWorks was supposed to pay Swish a flat fee of either \$13 or \$15 each time Virtual Works accepted a lead forwarded by Swish. According to Paragraph 15 of the FAC, VirtualWorks charged consumers anywhere between \$40 and \$55 for the debit cards it sold based upon leads forwarded by Swish.

7. Swish was not involved in charging any consumers and received no payments from consumers. Swish had no direct relationship or communications with consumers. Apart from Swish's agreement to forward leads to VirtualWorks, and VirtualWorks' agreement to pay Swish the flat fee for each lead that was accepted, Swish and Virtual Works had no other business or financial connection or relationship. Swish had no control over when and how VirtualWorks processed charges for the consumers whose information Swish forwarded to VirtualWorks. Neither Swish nor any of its past or present officers or directors have ever held any position with, or ownership interest in VirtualWorks.

13 8. At the height of Swish's business, it had over 100 clients. VirtualWorks was less
14 than 10% of Swish's total revenue for 2007. Conversely, Swish was just one among many lead
15 generators used by VirtualWorks to post advertisements for VirtualWorks' debit cards.

16 I declare under penalty of perjury under the laws of the United States of America that the
17 foregoing is true and correct, and that this Declaration was executed on August 31st, 2010, at
18 Redwood City, California.


MATTHEW PATTERSON